2012 WL 5935368 (Ill.App. 1 Dist.) (Appellate Petition, Motion and Filing)
Appellate Court of Illinois, First District.

James RYAN, Plaintiff-Appellee,
v.
FOX TELEVISION STATIONS, INC., Fox Television Holdings, Inc., Larry Yellen, Dane Placko, Marsha Bartel, and Carol Fowler, Defendants-Appellants,
BETTER GOVERNMENT ASSOCIATION, INC., and Andy Shaw, Defendants.

Nos. 12-0005, 12-0007.
January 8, 2012.

Petition for leave to appeal from the Circuit Court of Cook County, Case No. 10-L-6258
Judge James D. Egan
Date of order: December 1, 2011

Defendannts-Appellants' Petition for Leave to Appeal Pursuant to Supreme Court Rule 306(a)(9)

Steven P. Mandell, Steven L. Baron, Sharon R. Albrecht, Mandell Menkes LLC, One North Franklin, Suite 3600, Chicago, Illinois 60606, (312) 251-1000, Attorneys for Defendants-Appellants Fox Television Stations, Inc., Fox Television Holdings, Inc., Larry Yellen, Dane Placko, Marsha Bartel, and Carol Fowler.

***i** POINTS AND AUTHORITIES

***1 I. INTRODUCTION AND STATEMENT OF ISSUES**

Four years ago, the Illinois legislature passed a broadly-worded statute, the Citizen Participation Act (CPA), to provide sweeping immunity to those who are slammed with lawsuits for engaging in petitioning and speech directed at government. Nearly every court that has examined the statute has held that the CPA provides conditional immunity to defamation defendants, regardless of whether their statements are true or false. The only defendants not protected by the statute are those whose actions were not genuinely aimed at procuring favorable government action. The circuit court concluded, that this exception did not apply in this litigation, holding "[t]hat is not the case here." (A6.) This should have been the end of the case under the CPA.

But the circuit court refused to dismiss the complaint. Instead the circuit court expressed an oddly personal discomfort with the broadly-worded statute, lamenting that it *"is not the right thing"* to allow the defendants to win dismissal under the CPA, because such a victory would require a "mandatory grant of attorney fees and costs" against Plaintiff, who happens to be a fellow Cook County judge. The circuit court's decision is more than a flawed interpretation - it is a judicial re-writing of the law based on a personal dislike of the CPA's mandatory fee-shifting provision and its broad immunity. But it is the job of the legislature, not the courts, to revise statutes.

The circuit court said that its ruling is based on a supposed contradiction between the Second District appellate court's decision in *Sandholm v. Kuecker* and its progeny, and the Illinois Supreme Court's decision in *Wright Development Group v. Walsh.* No other court has found any such contradiction - because there is none. The circuit court's interpretation of *Wright Development* is incorrect and has deprived Defendants of a ***2** valuable statutory immunity even though Defendants' petitioning speech explicitly called for the government to reform the way in which it used judicial resources. The WFLD Defendants now request that this Court allow an appeal of the circuit court's ruling pursuant to Supreme Court Rule 306(a)(9) and reverse the circuit court's ruling. [1]

II. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rule 306(a)(9), which allows a petition for leave to appeal "from an order of the circuit court denying a motion to dispose under the Citizen Participation Act (735 ILCS 110/1 *et seq.).* As is set forth in more detail below, Defendants-Appellants moved to dismiss Plaintiff's claims pursuant to the Citizen Participation Act, and the circuit court denied that motion on December 1, 2011.

III. STATUTE INVOLVED

Relevant portions of the Citizen Participation Act:

735 ILCS 110/5. Public policy.

Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation.

Civil actions for money damages have been filed against citizens and organizations of this State as a result of their valid exercise of their constitutional ***3** rights to petition, speak freely, associate freely, and otherwise participate in and communicate with government. There has been a disturbing increase in lawsuits termed "Strategic Lawsuits Against Public Participation" in government or "SLAPPs" as they are popularly called.

The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This **abuse** of the judicial process can and has been used as a means of timidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.

It is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an efficient process for identification and adjudication of SLAPPs; and to provide for attorney's fees and costs to prevailing movants.

735 ILCS 110/10. Definitions.

In this Act: "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, a subdivision of a state, or another public authority including the electorate.

"Person" includes any individual, corporation, association, organization, partnership, 2 or more persons having a joint or common interest, or other legal entity.

"Judicial claim" or "claim" include any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury.

"Motion" includes any motion to dismiss, for summary judgment, or to strike, or any other judicial pleading filed to dispose of a judicial claim.

"Moving party" means any person on whose behalf a motion described in subsection (a) of Section 20 is filed seeking dismissal of a judicial claim.

"Responding party" means any person against whom a motion described in subsection (a) of Section 20 is filed.

735 ILCS 110/15. Applicability.

This Act applies to any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or ***4** acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.

Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome.

735 ILCS 110/20. Motion procedure and standards.

(a) On the filing of any motion as described in Section 15, a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent An appellate court shall expedite any appeal or other writ, whether interlocutory or not, from a trial court order denying that motion or from a trial court's failure to rule on that motion within 90 days after that trial court order or failure to rule.

(b) Discovery shall be suspended pending a decision on the motion. However, discovery may be taken, upon leave of court for good cause shown, on the issue of whether the movants acts are not immunized from, or are not in furtherance of acts immunized from, liability by this Act.

(c) The court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act.

735 ILCS 110/25. Attorney's fees and costs.

The court shall award a moving party who prevails in a motion under this Act reasonable attorney's fees and costs incurred in connection with the motion.

735 ILCS 110/30. Construction of Act.

(a) Nothing in this Act shall limit or preclude any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

(b) This Act shall be construed liberally to effectuate its purposes and intent fully.

***5 IV. STATEMENT OF FACTS**

A. The Reports

On May 24, 25, 26, and 28, 2010, WFLD Fox News Chicago ran a series of reports during its local news broadcasts regarding a joint investigation undertaken by Defendants concerning the working hours of judges in Cook County (collectively, the "Reports").[2] The Reports were the result of a joint investigation involving WFLD and the Better Government Association ("BGA"), a non-profit advocacy organization that seeks to inform and engage citizens and promote integrity, transparency, and accountability in government. (See S.R. at C277.)

The first report, broadcast on May 24, 2010, presented the basic findings of the investigation. The broadcast outlined Circuit Court of Cook County Chief Judge Timothy Evans's stated requirement that judges should be at their courthouses until 4:00 p.m. every day. (*See* S.R. at C87.) The broadcast described an official report based on logs of Cook County sheriffs deputies that

revealed that many Cook County courtrooms were not open during business hours. The broadcast also described the results of WFLD's own survey of courtrooms in the Daley Center. (*See id.*) The report also stated the results of Defendants' investigation at several outlying criminal courts where judges were observed by hidden cameras positioned outside their courtrooms, which showed the judges leaving their courthouses well before 4:00 p.m.

***6** In one portion of the broadcast, Cook County Judge Gloria Chvere was caught on camera as she sunbathed on a patio outside her home at approximately 2:00 p.m. on a Wednesday when she was supposed to be on duty. (S.R. at C86.) Judge Chvere later told reporter that such behavior was acceptable and that she was simply efficient at handling her court call before the courthouse closed. (See id at C88 ("If the call is over at one-thirty or two o' in the afternoon, what would be the point of being in an empty courtroom?... [J]udges shouldn't be penalized for efficiently handling their call").)

Concerning Plaintiff, the report stated, "We caught him leaving the courthouse early three times. On a rainy October day, he was home by 1:18. He never returned our calls." (S.R. at C89.) The report also named two other judges who were seen leaving their courthouses before 4:00 p.m. (Id.) Commenting on the results of this investigation, Defendant Andy Shaw suggested that judges should be required to punch time cards to ensure that they perform the appropriate amount of work. (Id. at C88.)

The second report, broadcast on May 25, 2010, followed on the previous day's report with an analysis of the cost of the Cook County judicial system to taxpayers and possible reactions to the investigation by the court system and the electorate. The report described judges' salaries and benefits. *(See* S.R. at C90-92.) Like the firstreport, the second report questioned whether all Cook County judges have enough work to do. (See id. at C9 ("Chief Judge Tim Evans says if our investigation shows that a judge's day ends too soon, he'll assign them more cases.").) The report discussed which state agency handles complaints about elected judges. (*See id.* ("Chief Judge Evans says it's the state's Judicial Inquiry Board which takes action against problem judges.").) The report ***7** questioned whether further supervision or new rules could ensure compliance by Cook County judges, who are elected and therefore primarily accountable to voters. The report included the following discussion between WFLD reporter Larry Yellen and station anchor Robin Robinson:

Robin Robinson: Sounds like a lack of supervision, like somebody didn't put a framework in place to get the most effective system there is.

Larry Yellen: You know, it might be a lack of accountability because judges are elected, as we pointed out in the piece. They're elected, that means they're accountable to the voters, but you know and I know that when people go to vote on judges, they don't know the details of whom they're voting on. It's the bottom of the ballot, everybody's tired by then, and they can't recognize all those names.

(Id.

At the conclusion of the May 25 report, anchor Robinson announced that the May 24 report contained one error about Plaintiff on one of the three days that he was observed leaving the court early, but stated that the station was standing behind its report that Plaintiff had been observed more than once leaving court earlier than the 4:00 p.m. departure time set by the chief judge. Robinson stated,

Last night's story, by the way, identified Judge Jim Ryan as one of the judges leaving work early. We watched Judge Ryan leaving the courthouse and said he went home. But the house and the car we showed actually belonged to a neighbor. Our bad. While we saw the judge leave work early, we really don't know where he went. We do apologize for that mistake.

(S.R. at C92.)

The third report, broadcast on May 26, 2010, reported the reaction of the Illinois Supreme Court to the first two reports. The May 26 report quoted the Supreme Court's ***8** spokesperson, Joe Tybor, who said that the judges' early departures depicted

in the Reports was "totally unacceptable and, in the court's mind, cannot be tolerated." (S.R. at C93.) The Reports also quoted Mr. Tybor as saying that the "Supreme Court just wants to have a discussion with Judge Evans about what the situation is and what resources can be given him if he needs resources to improve the situation." (Id.) Larry Yellen reported that Supreme Court justices planned to meet with Chief Judge Evans and all judges who supervise the judges mentioned in the Reports. (Id. at C94.) Andy Shaw of the BGA called on Chief Judge Evans "to do the right thing, to move quickly and to reform the system." (Id.)

The fourth report, broadcast on May 28, 2010, discussed Chief Judge Evans's reaction to the previous Reports. Just four days after the first of the Reports, Chief Judge Evans announced that each of the four judges mentioned in the Reports including Plaintiff would be reassigned and would receive mentoring from experienced judges. In is Amended Complaint, Plaintiff himself alleged that Chief Judge Evans' s actions directly resulted from the Reports. (See S.R. at C12, 40-41.) Chief Judge Evans stated that his actions wer intended to prevent the "unacceptable behavior of a few judges" from "undermin[ing] the credibility and integrity of our entire system of justice." (SR. at C95.) The report included an interview with Harold Krent, dean of Chicago-Kent College of Law, who stated that the problems identified in the Reports are "systemic" and posited that Chief Judge Evans actions were intended to signal to other Cook County judges at they should "conform themselves and watch their own conduct." (Id.) The report explained that reassignment is "one of the few tools"

***9** available to the chief judge, since "judges are elected or appointed" and cannot be "fire[d]" by the chief judge. (S.R. at C96.)

B. Plaintiff's Complaints And Procedural Posture

Plaintiff filed his original complaint against Defendants on May 27, 2010, alleging a single claim for defamation based on the Reports. Defendants moved to dismiss that complaint pursuant to the CPA, and, after briefing, the circuit court denied their motions on October 28, 2010. Defendants twice attempted to appeal that ruling, first under Supreme Court Rule 304(a) and then under Rule 308, but this Court did not allow the appeals. [3] (S.R. at Cl, C345.)

On May 19, 2011, Plaintiff filed his First Amended Complaint At Law ("Amended Complaint"). The Amended Complaint alleges four claims, all based on the Reports: defamation, false-light invasion of privacy, intentional infliction of emotional distress, and invasion of privacy by intrusion upon seclusion. Plaintiff claimed that "Defendants falsely alleged that [Plaintiff] left work early three times and was at his residence at 1:18 p.m. in the afternoon on October 9, 2009 and showed his alleged vehicle in the driveway of his alleged home." (S.R. at C5, ¶ 18.) Plaintiff complained about the about the Reports' "implications" "that [he] committed the criminal act of official misconduct," "that [he] does not work a full day and should be fired," and that he was lazy and his actions amounted to malfeasance." (at C7-16, 22, 43, 56.) Plaintiff alleged that he "did not leave work early and was not at home as claimed by the ***10** Defendants" on one ofthe dates identified in the Reports. (*Id.* at C6, 20.) He suggested that "a simple review ofthe court records" would "prove [ ] [Plaintiff] did not leave work early on October 9,2009, April 7,2010 and April 13,2010." (at C9, ¶ 30.)

Plaintiff's claim for intrusion upon seclusion was based on Defendants' act of filming him as he walked and drove in an outdoor parking lot adjoining the public courthouse. Plaintiff alleged that Defendants "videotaped him covertly" in the parking lot, which was "his zone of solitude" where he had "a reasonable expectation of privacy," causing him "permanent injuries," "anxiety," and "anguish." (S.R. at C17-19, ¶¶ 63, 67-70.) Plaintiff demanded judgment of $7 million. (Id. at C21 (prayer for relief).)

Defendants filed motions to dismiss the Amended Complaint under the CPA on September 6-7, 2011, arguing that the CPA required dismissal of Plaintiffs' claims because the claims arose from Defendants' petitioning speech activity aimed at seeking government change, which is immune from liability under the CPA. (The WFLD Defendants and BGA Defendants filed separate motions.) In response, Plaintiff argued that the CPA's immunity did not apply because he had alleged that the Reports were "false." Plaintiff attached supposed evidence to his response brief that, he claimed, established falsity. (S.R. at C410-437.)

In reply, Defendants asserted that Plaintiff's argument and his purported evidence of falsity failed because, among other reasons, (1) the Reports were immunized under the CPA because the Reports sought government change, and the immunity applied even if Plaintiffs defamation claim was otherwise meritorious, (2) Plaintiff had not established that the lone exception to the CPA (known as the "sham" exception) applied to the Reports, and (3) even if some inquiry into the "falsity" of the Reports is appropriate in ***11** determining a motion under the CPA, Plaintiff did not produce the "clear and convincing evidence" that the CPA requires to establish such falsity. (S.R. at C598-611.) Defendants also provided a sheriff's report and corroborating transcripts to the circuit court that established that Plaintiff's court calls regularly ended early in the day, and therefore the Reports were substantially true. [4]

Defendants filed a motion to strike Plaintiff's "evidence" of falsity on the grounds that the documents were hearsay, lacked foundation, and were otherwise inadmissible. (S.R. at C593-596, C1465-1473.) Defendants also supplemented the briefing with two recent lower court opinions that held that truth or falsity of statements is not relevant to the CPA immunity analysis, which is the rule adopted by Illinois's higher courts. (S.R. at C346-393.)

At a hearing on November 21, 2011, the circuit court granted Defendants' motion to strike Plaintiff's "evidence" in part and denied it in part. (S.R. at 1533.) The circuit court also denied Plaintiff's motion to strike Defendants' pending CPA motions. (Id.) On December 1, 2011, the circuit court issued a written ruling denying

Defendants' motions to dismiss the complaint under the CPA. (A3.) The circuit court correctly held that the Plaintiff did not establish that "the defendant's acts were not genuinely aimed at procuring favorable government action," saying "[t]hat is not the case here." (A6.) The court also correctly held that Plaintiff's allegation that Defendants were driven by "profits" "does not affect the applicability of the CPA." (Id.) The circuit court also repeated its same reasoning from its October 28,2010, opinion denying Defendants ***12** CPA motions to dismiss the original complaint. (A8-16 (attaching prior order).) The circuit court's more recent opinion also added some more pointed attacks on the broad scope of the CPA, saying it was "not the right thing" to dismiss a defamation claim without examining truth or falsity, or to order Plaintiff to pay mandatory attorney's fees and costs fees to Defendants. (A7.)

V. GROUNDS FOR APPEAL

This Court should allow this appeal because the circuit court incorrectly interpreted and applied the CPA, and to fulfill the CPA's goal of speedy dismissal of lawsuits targeting protected petitioning and speech activity seeking government action.

A. The Citizen Participation Act Contemplates Immediate, Expedited Appeal

This Court should also allow this appeal because it comports with the underlying policies and purposes of the CPA. The CPA specifically contemplates that interlocutory appeals should proceed in circumstances such as this, because of the importance of speedy and complete resolution of litigation implicating the rights that the CPA seeks to protect. See 735 ILCS 110/20(a) (requiring expedited interlocutory appeals). Illinois Supreme Court Rule 306 was amended to provide an avenue for permissive appeal of a circuit court's denial of a CPA motion. S. Ct. R. 306(a)(9) (eff. Feb. 16, 2011). If the Court grants this petition and allows an appeal, the WFLD Defendants intend to request that the appeal be expedited.

B. The Circuit Court Misinterpreted The CPA

The CPA provides both a substantive immunity and procedural protections that strongly favor defendants in cases such as this one. Here, the circuit court improperly applied the CPA in both regards. The language of the CPA is clear and has been broadly ***13** interpreted by state and federal courts. Rejecting this weight of authority, the circuit court misinterpreted the Supreme

Court's opinion in *Wright Development* Group, LLC v. Walsh, 238 Ill. 2d 620, 638 (2010), to require an analysis of truth and falsity of the challenged statements. But *Wright Development* did not require such an analysis.

This Court should allow this appeal because the WFLD Defendants present "reasonably debatable grounds, fairly challenging the [circuit court's] order." *Rollins v. Ellwood*, 141 Ill. 2d 244, 280 (1990) (holding that the appellate court erred by denying a petition for leave to appeal). More than that, the circuit court's ruling in this case was clearly incorrect and should be overturned on appeal.

1. The Citizen Participation Act

The CPA is an "anti-SLAPP" statute. That is, it provides a mechanism for defendants to quickly defeat lawsuits, such as this one, that seek to punish their exercise of free speech rights - "'Strategic Lawsuits Against Public Participation' in government or 'SLAPPs' as they are popularly called." 735 ILCS 110/5. The CPA created a new category of conditional immunity against claims that are based on certain category of First Amendment activity: "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government..., *regardless of intent* or purpose except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15 (emphasis added). As used in the CPA, "government" includes not only a "branch, department, agency, [or] employee" of a state, but also "the electorate." 735 ILCS 110/10. The CPA explains its purpose in detail:
Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely ***14** in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to... the operation of government [and] the making of public policy and decisions... The laws, courts and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation....

The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This **abuse** of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.

It is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an efficient process for identification and adjudication of SLAPPs; and to provide for attorney's fees and costs to prevailing movants.

735 ILCS 110/5.

The CPA's scope is "expansive." *Shoreline Towers Condominium Ass'n v. Gassman* 404 App. 3d 1013,1020 (1st Dist. 2010 *see also Wriht Dev. Group. LLC v. Walsh* 238 Ill. 2d 620,639 (2010) (highlighting the CPA's instruction that it "is to be 'construed liberally') (quoting 735 ILCS 110/30). The CPA changed Illinois's substantive defamation law and "provid[es] a new, qualified privilege for any defamatory statements communicated in furtherance of one's right to petition, speak, assemble, or otherwise participate in government." *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 851 (2d Dist. 2010) (PLA granted Jan. 26,2011). The CPA "grant[s] more protection for speech than the common law provides, when the speech occurs in the exercise of the right to participate in government." *Id*

***15** The CPA's protection is not limited to statements made during government proceedings or directly to government officials. "The Act states that it applies to 'any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government."' *Id.* (court's emphasis). The Illinois Supreme Court has held that the CPA does not contain "a requirement of direct appeal to a government official." *Wright Dev.*, 238 Ill. 2d at 638. Statements

made outside of a government meeting can still be immunized under the CPA if the statements "address[ ] a public matter's such as the actions of government officials, or if the statements "potentially affect[either a specific group of citizens or citizens "at large." *Id.* at 635-636. The Supreme Court held that an activis's statements to a newspaper reporter were protected from liability under the CPA because the statements were related to government conduct and "directed at the electorate." Id. at 636 (emphasis in original). "The Act does not protect only public outcry regarding matters of significant public concern, nor does it require the use of a public forum in order for a citizen to be protected." *Shoreline Towers.* 404 111. App. 3d at 1020.

The CPA sets up a two-step procedure for early resolution of a SLAPP. The statute allows a defendant to file a motion to dismiss a claim that "is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government," including a "motion to dismiss, for summary judgment, or to strike, or any other judicial pleading filed to dispose of a judicial claim." 735 ILCS 110/10,15. The filing of a CPA motion automatically stays all discovery. 735 ILCS 110/20(b).

***16** Once the defendant files a motion under the CPA, the burden shifts to the plaintiff to establish by "clear and convincing evidence" that immunity does not apply. 735 ILCS 110/20(c). The plaintiff must provide clear and convincing evidence that the defendants' speech or petitioning activity was "not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15. This is known as the "sham" exception to the CPA. *Sandholm* 405. App. 3d at 844. If the plaintiff cannot meet that significant evidentiary and legal burden to prove the sham exception, the CPA requires the trial court to dismiss the plaintiff's complaint. 735 ILCS 110/15.

This "sham" exception to the CPA is specifically intended to invoke what is known as the "sham" exception to the Noerr-Pennington doctrine of antitrust law.[5] The language itself quotes *City of Columbia v. Omni Outdoor Advertising Inc.* 499 U.S. 365 (1991), and the CPA's legislative sponsor specifically stated that it "codifies the standard" from that case.[6] *See also Sandholm* 405 Ill. App. 3d at 846-862 (examining City of Columbia and related cases to apply the CPA).

The sham test is initially an objective test. The Sandholm court explained the sham test as follows: the court "first consider's] whether objective persons could have reasonably expected to procure a favorable government outcome... through" the acts that are the basis for the plaintiff's claim. Sandholm, 405 Ill. App. 3d at 862 (emphasis in ***17** original). "If the answer to that question is 'yes,' the court need not consider the subjective intent of defendants' conduct." Id.

If the objective test is satisfied, the court is not required - not permitted - to inquire into the defendant's subjective intent. Only if the court concludes that "objective persons could not have reasonably expected to procure a favorable government outcome" may the court consider whether the defendants "subjective intent was not to achieve a government outcome that may [incidentally] interfere with plaintiff but rather to interfere with plaintiff by using the governmental process itself." Id. Thus, a defendant's intent or purpose' is not considered unless a reasonable person could not expect a favorable government outcome." Id. at 864.

Lower courts have consistently adopted and applied this test. See Garrido v. Arena, Case No. 11-L-4012 (Cir. Ct. Cook Cty. Sept. 16,2011), at 4-9 (S.R. at C355-380) (dismissing claims under the CPA, applying Sandholm and rejecting plaintiff's argument that allegations of falsity or concerning the defendants' subjective state of mind were relevant); Satkar Hospitality Inc. v. Cook Ctv. Bd. of Review. No. 10-cv-6682, 2011 WL 4431029 (N.D. Ill. Sept. 21,2001) (dismissing claims under the CPA and citing the test laid out in Sandholm); Trudeau v. ConsumerAffairs.com, Inc. No. 10-cv-7193, 2011 WL 3898041, at *6 (Sept 6,2011) (quoting andholm and Wright Development at length without suggesting any conflict between the two); Chi v. Loyola Univ. Med. Ctr., 787 F. Supp. 2d 797, 809-12 (N.D. Ill. 2011) (citing Sandholm extensively and noting that the linois Supreme Court does not appear to have addressed the standard to be applied in making the[e] determination" of whether the sham exception applies).

***18** The CPA's immunity applies even when the defendant might otherwise be liable for publishing a false and defamatory statement. "Under the Act, the right to petition government is guaranteed and in so petitioning, one also has the right to commit

libel with impunity, as long as he does so with the genuine aim of procuring government action....Here, in protecting the rights of citizens to participate in government, the legislature provided a qualified privilege to speak even with actual malice." *aolm*, 405 I. App. 3d at 854-55; *see also Shoreline Towers*, 404 Ill. App. 3d at 1019-23 (affirming dismissal of defamation claim without analyzing whether the alleged statements were actuay false and defamatory); *Garrido S.R.* at C366 ("I don't really see that the truth or falsity of the statements is the issue...[T]he only question is were the statements in furtherance of the right to participate in government."); Satkar 2011 WL 4431029, at *6 (rejecting the plaintiff's argument "that the ICPA cannot apply if the defendant's statements are false" and quoting the above language from the Sandholm opinion).

2. The CPA's immunity should apply in this case

In this case, Plaintiff'ss claims are "based on, relate[ ] to, [and are] in response to" the publication of the Reports and the WFLD Defendants' underlying newsgathering. 735 ILCS 110/15. The WFLD Defendants' actions were "in furtherance of their First Amendment "rights of petition, speech,... [and] to otherwise participate in government," 735 ILCS 110/15, because the Reports were media speech concerning the "operation of government," 735 ILCS 110/5. The same reasoning applies to Plaintiff's claim for intrusion upon seclusion, which is based on the WFLD Defendants' surveillance of a government-owned, outdoor courthouse parking lot, newsgathering "in furtherance" of the exercise of rights embodied in the Reports. See 735 ILCS 110/10 ***19** (The CPA can apply to "any... cause of action."); see also Hall v. Time Warner, Inc., 63 Cal. Rptr. 3d 798 (Cal. Ct. App. 2007) (applying California's anti-SLAPP statute to dismiss claims of trespass, intrusion upon seclusion, and **elder abuse** because media interview in nursing home was "in furtherance of the defendants' First Amendment rights).

The Reports concerned "a public matter" and public officials. Wright Development 238 Ill. 2d at 636. The Reports discuss judges' compliance with work requirements and the related issues of judges' salaries, procedures for disciplining judges, and accountability of Illinois judges as elected officials. (See S.R. at C18, ¶ 67 (Plaintiff alleges that the Reports concerned his "dedication to his duties as a Cook County Circuit Court judge.").) Publishing the Reports, which raised questions about these important issues, is classic First Amendment speech and petitioning activity by the media. This type of investigative journalism, which focuses on the operation of government, can be labeled as "petitioning speech" and "indirect petitioning" because it uses media speech to appeal to government officials and voters to investigate the issues, and if necessary, insist on political action.

The Reports were "directed at the electorate." Wright Dev., 238 Ill. 2d at 636. The Reports discussed voters' role in selecting and retaining judges and how that system may ultimately result in a lack of judicial accountability if voters are not sufficiently informed. The Reports informed the public concerning the operations of government, government waste, and inefficiencies in the judicial system - issues that "potentially affect[ ] citizens... at large." Id. Plaintiff himself identifies portions of the Reports that perform this role, such as discussion in the Reports concerning methods for judicial ***20** discipline and oversight. (See S.R. at C11-12, ¶ 39 (referring to discussion in the Reports about possible disciplinary responses to judicial misbehavior).)

The Reports were also directed toward the government itself- the Illinois Supreme Court and Cook County's chief judge, who have supervisory control over the work habits of the Cook County bench. WFLD partnered for the investigation with the BGA, an organization whose mission is to affect the operations of government, in part through providing information like the Reports. The Reports question whether further supervision could result in improved performance by elected judges and discuss possible administrative responses to judicial misconduct. The Reports were directed at procuring the "favorable government action, result or outcome" of improved oversight of Cook County judges and compliance with the chief judge's requirement for working hours. In fact, WFLD reporters presented the findings of the underlying investigation to the chief judge and a spokesman for the Illinois Supreme Court and asked for comment. Just as in Wright Development, Shoreline Towers, Sandholm Satkar and Garrido, the Reports are immunized by the CPA because they are petitioning speech concerning government conduct, public issues, and government investigations, directed at the electorate and government officials.

Indeed, the Reports caused results almost immediately, as Plaintiff admits in his complaint. (See S.R. at C12, ¶ 40-41.) The Supreme Court reacted quiclly; its spokesman stated that the Court wanted to know whether Judge Evans would need more resources to address the situation. Judge Evans recognized a need for increased judicial accountability and ordered reassignment

and mentoring of several judges including Plaintiff and additional supervision in certain areas of the court. These results ***21** demonstrate that the Reports clearly are not objectively baseless petitioning activity, and this objective determination is sufficient to prevent the Reports from being deemed a "sham."

Because the WFLD Defendants met their burden of showing that their petitioning speech and related newsgathering are covered by the CPA, the burden then shifts to Plaintiff to show that the Reports were objectively baseless and not reasonably directed at procuring the "favorable government action, result or outcome." 735 ILCS 110/15. Plaintiff did not and cannot meet this substantial burden, because "objective persons could have reasonably expected" that publishing the investigative Reports about judges" work habits would "procure favorable government outcome." Sandholm 405 Ill. App. 3d at 862. Indeed, the Reports did spark a "favorable government action, result, or outcome." 735 ILCS 110. Because Plaintiff did not meet his burden of establishing that the Reports fall outside the "objectively reasonable" or "sham" test, the full immunity of the CPA should apply to the claims against the WFLD Defendants, and the circuit court should have granted the WFLD Defendants' motion to dismiss.

3. The circuit court erred

The circuit court denied the WFLD Defendants' CPA motion based on a flawed interpretation of the linois Supreme Court's decision in *Wright Development* The circuit court concluded that the *Wright Development* court had i fact, considered the truth or falsity ofthe statements at issue in that case to be a factor in the application ofthe CPA sham exception. On that basis, the circuit court found that the Wright Development opinion conflicts *Sandholm* and the numerous authorities that have relied on it

***22** The circuit court'S interpretation of *Wright Development* is incorrect. In fact, the *Wright Development* court discussed truth and falsity only in order to reject the arguments of the plaintiff in that case, and it did not lay out the legal rule that the circuit court in this case erroneously discerned. To understand this aspect of the *Wright Development* decision, it is necessary to examine not only the Supreme Court's opinion but also the parties' arguments in that case.

Wright Development involved a claim of defamation based on statements that the defendant, Walsh, made to reporter after a public meeting about property development issues. Walsh was the president of the condominium association in a building that had been developed by two entities, Sixty Thirty, LLC, and Wright Management, LLC. His association had filed a lawsuit against those two entities, alleging fraud. In an interview by a newspaper reporter after the public meeting, Walsh referred to the building's developer as "Wright Development Group." Unbeknownst to Walsh, the entity Wright Development Group, LLC ("Wright Development"), existed and was related to the developers, but it apparently had not been involved in the development of his property. Wright Development sued Walsh for defamation.

In briefing before the llinois Supreme Court, Walsh argued (as the WFLD Defendants do here) that the CPA's sham exception derives from antitrust law and is independent of the merits of the underlying defamation claim. (See S.R. at C183 (Walsh opening brief).) By contrast, Wright Development argued that a statement could not be "genuinely aimed at procuring favorable government action," 735 ILCS 110/15, if it were false, and that the CPA therefore could not apply to defamatory statements. S.R. at C214-222 (Wright Development response brief, arguing that the CPA did not ***23** change the law of defamation); id at C226 ("The fact that [Walsh] made the defamatory statements with knowledge of their falsity reveals that his acts were subjectively baseless.").) Based on that reasoning, Wright Development attempted to establish that Walsh had lied to the reporter and knew that he was lying. In reply, Walsh argued that Wright Development's legal analysis was faulty and - importantly that the Court could disregard those legal arguments in any event because they were all premised on the incorrect assertion that Walsh had admitted to intentionally lying. (See S.R. at C247 (Walsh reply brief, arguing that the court need not address the issue of whether the CPA immunizes intentional torts because there was no defamation in that case).)

The Supreme Court agreed with Walsh, and actually adopted the reasoning of Walsh's reply brief. (*Compare* S.R. at C249-252 (Walsh reply brief) *with Wright Dev.* 238 Ill. 2d at 636-38.) Contrary to the circuit court's ruling in this case, the Supreme Court did not hold that the underlying truth of challenged statements in a defamation sui's determines whether the CPA applies. The Supreme Court did not address that question (nor did it need to) because Wright Development could not even substantiate

its own claim that Walsh had been "intentionally lying." The Supreme Court also did not reject the two-part sham exception analysis; it simply never needed to reach that point in the analysis.

Thus, the circuit court was incorrect to conclude that the *Wright Development* decision mandates consideration the truth of the allegedly defamatory statements. The Supreme Court's discussion of "intentional lying" did not create a new "sham" exception that requires the plaintiff show that the defendant was "intentionally lying." Further, any such new "sham" rule would be contrary to the provisions of the CPA. Allowing a court ***24** to delve into allegations of "intentional lying" during a CPA motion would violate the spirit and letter of the CPA. The statute requires a speedy resolution of a CPA motion -the court must decide a CPA motion within 90 days, and discovery is stayed. See 735 ILCS110/20(a), (b).

Even if the circuit court correctly interpreted *Wright Development*, it did not even properly carry out an analysis based on its own flawed interpretation of the CPA in this case. First, the circuit court never found -nor could it - that Defendants publication of the Reports with "intentional lying." Plaintiff provided no such evidence, and there is none. Second, the circuit court never found that the Reports were materially false. The circuit court held that granting the CPA motion "without determining if [the Reports] are false and defamatory is not the right thing." (A7.) Yet the circuit court did not even determine that the Reports were materially false, nor could it have found that the Reports were materially false based on the record.

Plaintiff did not produce "clear and convincing" evidence of material falsity of the Report. Much of Plaintiffs' "evidence" was stricken by the circuit court (S.R. at C1533.) The remaining documents which also should have been stricken as inadmissible did not prove material falsity. Although the WFLD Defendants did not have the burden of showing truth, they provided a sheriff's report and corroborating court records establishing that Plaintiff's court calls regularly ended early in the day. The portion of Plaintiff's evidence that was accepted by the circuit court did not establish otherwise, and the circuit court did not even refer to the WFLD Defendants' evidence.

The circuit court did not properly apply the CPA and reached the wrong result. Appellate review is appropriate.

***25 VI. CONCLUSION**

Interlocutory appeal is appropriate in this case. The circuit court has manufactured an ambiguity in the case law applying the CPA and has issued an erroneous a ruling that deprived the WFLD Defendants of important statutory rights.

WHEREFORE, the WFLD Defendants respectfully request that this Court grant this petition, require that the circuit court grant their CPA Motion, and provide such further relief as is just.

Footnotes

1 This petition will refer to Defendants-Appellants Fox Television Stations, Inc., Fox Television Holdings, Inc., Larry Yellen, Dane Placko, Marsha Bartel, and Carol Fowler collectively as the "WFLD Defendants." This memorandum will refer to all defendants collectively as "Defendants."

2 The Reports were attached as exhibits to the WFLD Defendants motion to dismiss in the circuit court and will be provided to this Court with the supporting record to this petition. (S.R. at C81.) Also attached as exhibits to the motion to dismiss were a transcript of the Reports (S.R. at C86); various promotional clips, which Plaintiff also claimed to be defamatory (S.R. at C99); and transcripts of those promotional clips (S.R. at C102.)

3 This Court's dismissal of the appeals under Rule 304(a) was for lack of appellate jurisdiction. Defendants attempted to appeal under Rule 304(a) and Rule 308 because Rule 306(a)(9), which now provides for jurisdiction over an appeal "from an order of the circuit court denying a motion to dispose under the Citizen Participation Act," was not effective at the time of the district court's denial of Defendants' motions to dismiss the original complaint in this case.

4 The sheriff's report is in the Supporting Record at C623. The summary chart of Plaintiff's preliminary hearings is at C607, and the voluminous transcripts are at C631-1421.

5 In addition to *City of Columbia*, the main Supreme Court cases outlining this doctrine are *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

6 *See* 95th General Assembly, House Debate Transcript, May 31, 2007, at 58 (included in S.R. at C111-115) (Representative Franks states, "[W]hat this Bill does is it codifies the standard in a 1991 U.S. Supreme Court case, the City of Columbia v. Omni Outdoor Advertising when dealing with citizens participation lawsuits.").

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